UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

In re Holocaust Victim Assets Litigation, Fee Application of Burt Neuborne — **No. CV-06-983(ERK)(JO)**

Final Memorandum of Law in Support of Application of Burt Neuborne for Counsel Fees in Connection with Post-Settlement Services Rendered as Lead Settlement Counsel

At our last status conference, the Court directed the parties to submit a summary of the record in the case and to address each of the remaining contested issues that are being submitted for resolution by the Court. We will address each of these issues in turn, mostly by reference to the voluminous record already before the Court.

A. Procedural Background

On January 29, 1999, the parties executed a settlement agreement in *In re Holocaust Victim Assets Litig.*, Civ. No. 96-4849 (ERK), pursuant to which Swiss banks representing approximately 75% of the Holocaust-era Swiss banking community agreed to pay $1.25 billion to the plaintiffs in return for country-wide Holocaust-era releases from five settlement classes.[1] On February 1, 1999, the District Court designated Burt Neuborne (hereafter the "movant") as a settlement counsel with responsibility for representing the settlement classes in connection with the defense and implementation of the complex settlement. On April 11, 1999, after provisional certification of the settlement classes, at the urging of the District Court and co-settlement counsel, movant accepted the District Court's designation as Lead Settlement Counsel.[2]

[1] Movant played a central role in achieving the historic settlement. In his capacity as co-counsel for all parties, movant designed and organized the plaintiffs' Executive Committee, served as chair of the Law sub-committee, drafted the plaintiffs' four inter-locking amended complaints, filed the definitive statement of plaintiffs' legal theories, led plaintiffs' counsel in presenting oral argument, and participated fully in the negotiation process. Chief Judge Korman has described movant as "the glue that held the plaintiffs' Executive Committee together." *In re Holocaust Victim Assets Litig.*, 270 F. Supp.2d 313, 316 (EDNY 2004), quoted in *In re Holocaust Victim Assets Litig.*, 415 F. Supp.2d 130, 131 (EDNY 2004). A brief summary of movant's pre-settlement work is contained in the omnibus Declaration of Burt Neuborne, dated March 17, 2006 at pp. 90-93.

[2] Once an agreement in principle to settle the litigation was reached on August 12, 1998, movant withdrew from active participation in the Swiss bank case in order to concentrate on preparing the litigation against German companies that eventually resulted in the creation of the $5.2 billion German Foundation: Remembrance, Responsibility and the Future. Movant played no further role in the Swiss bank case until he was asked in late January, 1999, to return as a settlement counsel. The circumstances surrounding

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For the past seven years, movant has served continuously as Lead Settlement Counsel, designing and carrying out the novel "pre-commitment" legal theory underlying the implementation of the settlement; supervising the notice program; representing the settlement classes in 29 formal legal proceedings; renegotiating several crucial portions of the settlement agreement; successfully obtaining information needed to administer the various claims programs; aiding in the design and oversight of claims programs for four settlement classes and assisting in the *cy pres* administration of the fifth; successfully lobbying Congress to exempt the settlement fund from federal income taxation, thereby adding more than $50 million in value to the settlement fund; successfully obtaining compound interest on the escrow funds, thereby adding $5 million to the value of the settlement fund; successfully accelerating payment the fourth installment of the settlement amount, thereby adding $22.5 million to the value of the settlement fund; counseling hundreds of class members in connection with the filing of claims; defending the settlement in the public arena; monitoring the investment of the settlement funds; overseeing the payment of funds from the settlement accounts; and counseling the District Court and the Special Masters on the legality and propriety of literally hundreds of decisions required to implement the settlement agreement and distribute the settlement assets to the members of the settlement classes. During movant's seven year tenure as Lead Settlement Counsel, more than $900 million has been distributed to more than 400,000 class members throughout the world.

On December 19, 2005, movant filed an application for an award of post-settlement counsel fees for legal services rendered to the settlement classes during the 6¾ year period from February 1, 1999-October 1, 2005.[3] The application sought lodestar hourly fees for more than 8,000 hours of work, and was duly served on all settlement counsel. On December 29, 2005, Robert Swift, a settlement counsel, filed objections to movant's fee application. On or about January 11, 2006, Samuel Dubbin, acting on behalf of several class members, filed additional objections to the fee application.

The parties then exchanged voluminous written submissions attacking and defending the fee application. Movant submitted: (1) a Declaration of Burt Neuborne, dated November 1, 2005, with contemporaneous time records annexed; (2) a

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movant's reluctant acceptance of the District Court's request that movant serve as Lead Settlement Counsel are set forth in the March 17 omnibus declaration at p.3, n.3. .

[3] Movant's services to the settlement classes are described in detail in his March 17, 2006 Omnibus Declaration at pp. 1-78, and in the contemporaneous time records annexed to the March 17 omnibus declaration as Exhibit C. Exhibits A and B to the March 17 declaration list movant's principal tasks and provide a time line placing the tasks in chronological order. Exhibit D consists of representative legal documents prepared by movant bound in 17 volumes, and available at NYU Law School for inspection by court and counsel. Exhibit E is movant's curriculum vitae. Exhibit F is movant's definitive statement of plaintiffs' legal position lodged with the District Court in June, 1997. Exhibit G consists of declarations by six co-settlement counsel supporting this application. A similar declaration in support was lodged independently by counsel for the State of Israel on March 24, 2006. Exhibit H consists of declarations by four knowledgeable attorneys establishing the current prevailing billing rates for lawyers of movant's skill, expertise and reputation in the New York City legal market.

Supplemental Declaration of Burt Neuborne, dated January 31, 2006; (3) a Second Supplemental Declaration of Burt Neuborne, dated February 24, 2006; and (4) a Supplemental Declaration Correcting Factual Misstatements in the Swift Memorandum of Law, dated March 3, 2006.

At Chief Judge Korman's direction, the parties exchanged omnibus documents on March 17, 2006, summarizing and supplementing prior submissions. Movant submitted an omnibus Declaration of Burt Neuborne, dated March 17, 2006, summarizing and supplementing the material in his earlier four declarations. In addition, movant filed a Memorandum of Law in Support of Lead Settlement Counsel's Application for an Award of Counsel Fees for Post-Settlement Services Provided to the Settlement-Classes, dated March 17, 2006. Objectors filed similar omnibus documents on March 17. All documents filed by the parties supporting and opposing the fee application have been posted on the web site maintained by the settlement classes. Movant continues to rely on his March 17, 2006 Omnibus Declaration and Memorandum of Law as a principal support for this application, as well as his four prior declarations.

On March 2, 2006, counsel engaged in an extended telephone conference with Chief Judge Korman on the fee issue, [4] during which Chief Judge Korman stated:

> Now I believe that Professor Neuborne is entitled to legal fees here. I agreed with him that he would be entitled to legal fees…[I]n language Mr. Neuborne quotes in a lot of his filings, I eluded [sic] to the difference between counsel fees and approving a settlement and counsel fees in terms of work that was done post-settlement. So you know, that…my overall view is that he's entitled to counsel fees. …I don't know whether you want oral argument or not, but my view is that I retained him.
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> ... my preliminary view, you know, subject to when I reread all of your comments and documents, you know, whatever is said there to persuade me. Otherwise, that's my basic view. He rendered extraordinary service. He's entitled to be paid a reasonable fee. Transcript of Proceedings, March 2, 2006, pp. 6-7; 10-11.

Beginning in early January, 2006, once it became clear that movant's fee application was being contested, movant severed all personal contact with Chief Judge Korman in order to avoid even the appearance of *ex parte* communications concerning the pending fee petition. It soon became apparent, however, that such a posture made it difficult to carry out the daily tasks needed to administer and defend the settlement fund

[4] While Chief Judge Korman's preliminary observations do not definitively resolve any legal issues, his stated recollections at the March 2, 2006 conference provide the factual matrix for resolving any arguments premised on judicial or equitable estoppel, and provide the factual basis for an award of an excellence multiplier. The legal issues are discussed *infra* at pp. 6-10 (estoppel), and 16 (multiplier).

in an orderly and effective manner. Accordingly, on April 4, 2006, Chief Judge Korman recused himself from further consideration of movant's fee application, transferring the matter to Judge Block, who had been randomly designated to preside in those settings in this complex litigation where Chief Judge Korman deemed it appropriate to recuse himself.[5]

On March 27, 2006, prior to his recusal, Chief Judge Korman referred movant's fee application to Magistrate Judge Orenstein in an effort to narrow or resolve any factual issues, and to report and recommend concerning outstanding legal issues. On May 18, 2006, after extensive discussions with counsel, Magistrate Judge Orenstein issued an order reflecting the parties' agreement resolving issues of fact relating to movant's billing records. In lieu of protracted evidentiary proceedings, the parties agreed that movant would subtract 1,500 hours from the total hours claimed.[6] The May 18 order reflects that objectors contend that an additional 800 hours attributable to defending the rulings of the District Court must be subtracted from movant's application. The legal issue is discussed *infra* at 18-22. Finally, the May 18 order notes that Mr. Dubbin argues that only the 600 hours expended on legal services that actually resulted in net additions to the settlement fund qualify for fees. The legal issue is discussed *infra* at 17.

In addition to reflecting the parties' agreement on the number of qualifying hours, Magistrate Judge Orenstein's May 18, 2006 order identified five outstanding legal issues that remain for resolution on the existing record:

1. Resolution of objectors' claim that movant is estopped from seeking fees for post-settlement work.

2. Calculation of movant's lodestar hourly fee, an issue rendered considerably less complex by the recent decision of the Second Circuit holding that the hourly lodestar of a sole practitioner may not be reduced because of low overhead. See *McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 450 F.3d 91 (2d. Cir 2006), 2006 U.S. App. LEXIS 13965, n.6 (June 6, 2006).

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[5]For example, in 2002, after Chief Judge Korman had recused himself, Judge Block ruled on whether simple or compound interest was payable on settlement funds deposited in the escrow fund. *In re Holocaust Victim Assets Litig.,* 256 F. Supp.2d 313 (EDNY 2002). At Judge Korman's request, Judge Block also presided over the remand from the Second Circuit's decision construing the scope of the Slave Labor II class, and the motion seeking additional information concerning bank accounts from the defendant banks that ripened into Amendment 3 to the Settlement Agreement. See *In re Holocaust Victim Assets Litig.,* 282 F. 3d 103 (2nd Cir. 2002), on remand, *In re Holocaust Victim Assets Litig.*, Civ. No. 02-3314 (withdrawn as moot after stipulation resolving dispute filed); and *In re Holocaust Victim Assets Litig.,* (unnumbered – withdrawn as moot in light of June 10, 2004 Amendment to Settlement Agreement). After Chief Judge Korman recused himself, Judge Block issued the necessary confidentiality order applying Swiss law to the New York CRT II claims facility operating as a satellite to the CRT facility in Zurich.

[6] Movant had initially sought compensation for 8,178.5 hours. Subsequently, movant discovered that 200 hours during the summer of 2004 had been inadvertently omitted from the addition process, resulting in a corrected claim for 8,3178.5 hours. Removing 1,500 hours leaves a total of 6,878.5 hours of service.

3. Determination of whether movant is entitled to a multiplier for excellence and augmentation of the settlement fund.

4. Resolution of Mr. Dubbin's contention that, as a matter of law, only the 600 hours that were linked to an actual increase in the settlement fund qualify for fees.

5. Resolution of Mr. Swift's contention that, as a matter of law, 800 hours attributable to movant's defense of rulings of the District Court do not qualify for fees payable by the settlement classes.[7]

Given the parties' agreement resolving any factual issues raised by movant's time records, and the extensive sworn declarations and legal memoranda already before the Court, Magistrate Judge Orenstein deemed the factual record closed, and directed the parties to exchange letter briefs on or before July 21, 2006 in connection with each outstanding legal issue. Pursuant to Magistrate Judge Orenstein's May 18 order, movant respectfully submits the following five memoranda of law in connection with each outstanding issue.

[7] The parties agree that the legal sufficiency under Rule 23 of the notice to the class of movant's fee application should be resolved by Judge Block in the first instance. See Exhibit I to movant's March 17, 2006 Declaration, consisting of examples of widespread newspaper coverage of the fee issue, relevant to the issue of reasonable notice.

B. Memoranda on Outstanding Legal Issues.

1. Movant is Not Estopped from Seeking a Reasonable Attorney's Fee

Objectors argue that movant should be estopped from seeking reasonable counsel fees for any of his post-settlement work because, according to objectors, movant's representations concerning his *pro bono* pre-settlement activities caused certain class members to believe, erroneously, that movant was working without fee as Lead Settlement Counsel. While movant deeply regrets any confusion on the part of class members, absolutely no legal basis exists to impose an estoppel barring him from reasonable compensation for seven years of dedicated and remarkably successful service to the settlement classes.[8]

In order to impose an estoppel, whether judicial or equitable, three elements must coalesce: (1) materially false or inconsistent statements; (2) upon which individuals rely to their detriment; (3) in a manner that causes material prejudice to hearers or results in unfair advantage to the speaker. *New Hampshire v. Maine*, 532 U.S. 742 (2001); *Zedner v. United States*, 547 U.S. _____, 126 S. Ct. 1976 (2006). None of the three elements is present in this dispute.

First, movant has not made materially false or inconsistent statements concerning his fees. It is, of course true that for deeply personal reasons movant waived all counsel fees for having played a significant role in achieving the Swiss bank settlement. It is also true that movant has represented to the Court on numerous occasions that he had worked *pro bono* in achieving the settlement. It is, however, inaccurate to assert that movant represented that he was providing 8,000 hours of post-settlement services as Lead Settlement Counsel on a *pro bono* basis.[9] In fact, as Chief Judge Korman has noted, movant's representations to the Court concerning his *pro bono* status referred to the fact that he had waived fees for his pre-settlement work in achieving or obtaining the settlement. See the various Declarations of Burt Neuborne recited in his March 17 Omnibus Declaration at pp. 99-100; Transcript of Proceedings, March 2, p. 6.

Movant's representations to the Court concerning his pre-settlement *pro bono* work occurred in two contexts where such a representation was relevant in resolving legal issues before the Court. First, in order to insulate the Swiss bank settlement from conflict of interest objections that had doomed earlier class action settlements in *Amchem Products v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), movant placed on the record in proceedings implicating the fairness of the $1.25 billion settlement a representation that, unlike the lawyers in *Amchem* and *Ortiz* (who

[8] The facts underlying the estoppel issue are discussed in the March 17 Omnibus Declaration at 90-101. The legal issue is discussed in the March 17 Memorandum of Law at pp. 8-9; 19-23.

[9] Movant's various statements to the court concerning his pre-settlement *pro bono* status are summarized in detail in the March 17 Omnibus Declaration at pp. 99-101.

retained significant economic interests in the acceptance of settlements in which they had represented conflicting interests), movant had no financial stake in whether or not the settlement was accepted as fair because he had waived fees for having achieved it. Indeed, in approving the settlement's fairness, Chief Judge Korman expressly relied upon movant's lack of an economic interest in the acceptance of the settlement. *In re Holocaust Victim Assets Litig.*, 105 F. Supp.2d 139, 146 (EDNY 2000).

In addition, in an effort to cap the size of pre-settlement counsel fees in this case, movant stressed the availability of *pro bono* counsel at the pre-settlement stage of the litigation. In a difficult and complex case of this nature, counsel fees for achieving a $1.25 billion settlement would ordinarily approximate $200 million, either because of a "percentage of recovery calculation," or because of a substantial risk multiplier. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96 (2d Cir. 2005). Where, however, highly qualified counsel are willing to litigate such an action without fee, the usual risk multiplier/percentage recovery justifications are wholly absent. In such a setting, fees are calculated on an hourly lodestar basis. In order to assure that fees for all pre-settlement work in this case would be limited to an hourly lodestar computation, movant filed declarations with the District Court noting that he, Michael Hausfeld, and Melvyn Weiss had waived fees for achieving the settlement, thereby placing a ceiling on pre-settlement fees sought by other counsel. Chief Judge Korman explicitly relied on movant's declarations in rejecting Mr. Swift's request for a risk multiplier, and in insisting that all pre-settlement fees be calculated on an hourly lodestar basis, resulting in extremely modest pre-settlement fees of approximately $7 million. *In re Holocaust Victim Assets Litig.*, 270 F. Supp.2d 313, 320-21 (EDNY 2002). See Tr., March 2, at p. 40.

Indeed, far from misrepresenting his *pro bono* status, movant has consistently stated that his waiver of pre-settlement fees did not entail an agreement to work without compensation for seven years in a post-settlement mode. Thus, in November, 2000, movant formally notified Kenneth Feinberg and Nicholas deB Katzenbach, the arbitrators empowered to set fees in the German Foundation case, that he would seek hourly lodestar fees for work as Lead Settlement Counsel in the Swiss bank case.[10] Similarly, in February, 2002, movant informed the 2002 Institute for Law and Economic Policy Conference that he would seek hourly lodestar compensation for services as Lead Settlement Counsel. The paper was published as *Preliminary Reflections on Holocaust-Era Litigation in American Courts*, 80 Wash U. L. Q. 795 (2002), and has been cited with approval by the Supreme Court on several occasions.

Most importantly, as the March 2, 2006 Transcript of Proceedings quoted *supra* at p. 2 makes clear, movant informed Chief Judge Korman from the outset that he would seek hourly lodestar compensation for post-settlement service, and Chief Judge Korman wholeheartedly agreed. As Chief Judge Korman stated: "I agreed with him that he would be entitled to legal fees." Tr., p.6.

[10] Movant has provided objecting counsel with a copy of his statement to the German fee arbitrators.

It is, therefore, impossible to characterize movant's statements describing his pre- and post-settlement fee status as "clearly inconsistent." [11]

Second, no person with decision-making power was led to believe that movant had agreed to perform the grueling task of Lead Settlement Counsel without fee. As the record makes clear, the key persons administering the settlement all understood that movant would seek hourly lodestar compensation for his post-settlement services as Lead Settlement Counsel. As Chief Judge Korman, acting in his supervisory role under Rule 23(d) and (g), has noted: "I agreed with him that he would be entitled to legal fees…my view is that I retained him…He rendered extraordinary service. He's entitled to be paid a reasonable fee." Tr., Mar. 2, pp 5-7;10-11. In addition, six co-settlement counsel have filed declarations with the Court supporting movant's fee application, each asserting that they understood that movant would seek reasonable compensation for his post-settlement work. Finally, on March 24, 2006, counsel for the State of Israel, after carefully reviewing the record, urged the Court to reject any estoppel argument.

In fact, the transcript of the District Court's January 5, 2001 hearing on legal fees makes clear that Chief Judge Korman was differentiating between awarding fees for pre-settlement work to those lawyers who had not waived such fees, and awarding fees for post-settlement fees to counsel who were performing post-settlement work. ("At some point we are no longer dealing with achieving the settlement but of dealing with the tremendous problems that have risen in trying to bring the settlement proceeds ultimately to the beneficiaries of the class. That's included in the tremendous effort and work by Professor Neuborne…I mean there were hundreds, if not thousands, of hours of legal work that went into the second phase of this litigation. As it happened, it contributed a lot. But…this is traditional legal work in which evaluating it is not so difficult."). Transcript of Proceedings, January 5, 2001, pp. 12; 59.

Thus, it is impossible to argue that any decision-maker detrimentally relied on a representation that movant would work as Lead Settlement Counsel without fee.

[11] In seven years of service as Lead Settlement Counsel spanning dozens of settings, objectors have noted only two instances where movant failed to explicitly limit the judicial discussion of his *pro bono* status to his pre-settlement waiver of fees, and in each of those settings the context made it clear that movant was discussing pre-settlement fees. In September, 2005, in the course of the Hungarian Gold Train case, movant cited his *pro bono* work in support of an argument that Mr. Dubbin's request for 14% of the total recovery as pre-settlement fees in the Hungarian Gold Train case was excessive. While the exchange does not contain the usual qualifying language, its pre-settlement fee context makes it clear that movant was referring to his *pro bono* status in connection with the waiver of pre-settlement fees. When plaintiffs' counsel represented that unsuccessful efforts had, in fact, been made to obtain *pro bono* legal assistance, movant withdrew his objection. Similarly, in a November, 1999 declaration in support of the settlement's fairness, movant explained that his *pro bono* status removed any potential conflict of interest concerning the settlement's fairness. Once again, since the issue before the Court was the settlement's fairness, movant's observation that no conflict existed because he had waived fees obviously applied to pre-settlement fees for having achieved the settlement. In fact, as the March 2, 2006 transcript makes clear, that is how Chief Judge Korman understood the document. Tr., p.6.

Third, the settlement classes were not prejudiced in any way by movant's representations concerning the waiver of fees for achieving the settlement. As the record makes clear, Chief Judge Korman was not tricked into appointing movant because he believed that his legal services would be free. ("I agreed with him that he would be entitled to legal fees."). Tr. Mar. 2, at p. 5. Nor was Chief Judge Korman led to ignore competing candidates who were prepared to work without fee. ("I don't believe that any lawyer in this case would have been willing to donate 8,000 hours of time."). Tr., p.13. Finally, the class suffered no prejudice as a result of movant's appointment. Quite the contrary, the record makes clear that movant's excellent legal representation conferred significant benefits on the class. ("...I also think that there was no one of his ability, that even if they were willing to volunteer to do 8,000 hours, that I would have regarded as able as he was…this was service, you know, of an extraordinary nature…that was rendered, and ought to be paid…. I think there are very few people in his league and I think I've gotten the best"). Tr, .Mar. 2, at pp. 13; 31.

The Supreme Court's most recent judicial estoppel cases confirm that no serious legal case can be made for an estoppel on this record. *New Hampshire v. Maine*, 532 U.S. 742 (2001); *Zedner v. United States,* 547 U.S. _____, 126 S. Ct. 1976 (2006).

In *New Hampshire v. Maine*, *supra*, Justice Ginsburg, writing for a unanimous Court, described the three elements needed to invoke judicial estoppel. First, noted Justice Ginsburg, a party must make materially differing assertions to a court, with the later assertion being "clearly inconsistent" with an earlier position. 532 U.S. at 750. Second, a party must have succeeded in persuading a court to accept its earlier position, so that acceptance of the later assertion would create the perception that either the first or the second court was being misled. 532 U.S. at 750. Finally, courts ask whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair burden on the opposing party.

In *Zedner v. United States*, *supra*, Justice Alito, writing for a unanimous Court, re-affirmed Justice Ginsburg's formulation and applied it to reject the government's argument that a defendant's representations in support of an adjournment judicially estopped his subsequent invocation of the Speedy Trial Act.

Thus, on this record, none of the necessary elements for an estoppel are present. There is nothing "clearly inconsistent" about movant representing that fees had been waived in connection with achieving a settlement, but seeking fees for the seven years of grueling work needed to implement the settlement. Moreover, the record is clear that neither Chief Judge Korman, the six settlement counsel supporting this application, nor the State of Israel, were confused into believing that movant was prepared to expend more than 8,000 hours without a reasonable fee, merely because he had waived fees for achieving the settlement. Finally, as the record makes clear, no one has derived an "unfair advantage," or suffered an "unfair burden" as a result of movant's representations concerning his waiver of pre-settlement fees for obtaining the settlement.

Nor is there a credible argument that objecting counsel relied on nonpayment to class counsel for work done on behalf of the settlement administration. Thus, Mr. Swift not only did not object to payment to other class counsel, but tendered his support for an award of post-settlement fees at $850 per hour to Melvyn Weiss, a settlement counsel who had also waived his pre-settlement fees, and of $750 per hour to Elizabeth Cabreser, more than the figures sought by Mr. Neuborne. .

Finally, several members of the class who are represented by Mr. Dubbin also report that they believed that movant was working without fee for seven years as Lead Settlement Counsel. While such perceptions were both erroneous and unjustified, and despite Mr. Neuborne's regrets over any confusion, the fact remains that, as a legal matter, the objectors' erroneous perception that they were receiving extremely valuable legal services for nothing cannot generate an estoppel because: (1) the perception was unreasonable since no such representations were made; (2) the relevant decision-maker – Chief Judge Korman – was not confused; (3) no remotely comparable *pro bono* alternative was available; and (4) the class has received excellent legal representation that actually increased the value of the settlement fund by more than $50 million.

2. The Proper Hourly Rate for Mr. Neuborne is $700 Per Hour.

The parties disagree over the calculation of movant's hourly rate for purposes of setting the lodestar. Movant, a seasoned and highly respected academic lawyer with extremely broad experience as a successful litigator in complex cases, and a body of substantial scholarly achievement, seeks a fee of $700 per hour, a figure that reflects the prevailing market rate in the New York City legal community for lawyers of comparable skill, expertise and reputation. [12]

Mr. Neuborne graduated from Harvard Law School in 1964 with academic honors, and is now the Inez Milholland Professor of Civil Liberties at New York University School of Law, where he has taught Civil Procedure, Evidence, Constitutional Law and Federal Courts since 1974. He is a founder of the Brennan Center for Justice at NYU, and has served as its Legal Director since the Brennan Center's creation in 1995. In addition to a stint in private practice, movant spent eleven years as a litigator on the legal staff of the American Civil Liberties Union, including service as National Legal Director of the ACLU from 1981-1986. Movant has successfully argued numerous cases in the United States Supreme Court and in the Circuits, and has argued and tried numerous complex cases in the District Courts. Prior to accepting the District Court's designation as Lead Settlement Counsel, movant had maintained a successful consulting practice in connection with which he routinely charged the prevailing market rate for his services. In 2001, Mr. Neuborne was elected to membership in the American Academy of Arts & Sciences, the highest academic award in law, in recognition of movant's achievements as a litigator and scholar. On June 19, 2006, Mr. Neuborne was named by the National Law Journal as one of the 100 most influential lawyers in the United States.[13]

The objectors reject the notion that movant, a law professor, would command market rates comparable to fees payable to a private practitioner. Instead, they posit a series of alternatives to the prevailing market rate, ranging from a figure derived by dividing movant's academic salary by the number of academic hours worked, to a figure approximating the compensation of an associate in a private law firm, to a figure derived by blending the hourly rates of lawyers throughout the State of New York. As a matter of law, objectors' effort to displace the prevailing market rate for lawyers of comparable skill, expertise and reputation must be rejected.

The established ground rules governing the calculation of attorneys' fees in the Second Circuit are summarized in the Circuit's recent opinion in *McDonald v. Pension Plan*, 450 F.3d 91, 2006 U.S. App. LEXIS 13965 *9 (June 6, 2006):

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[12]The law governing the calculation of attorney's fees in the Second Circuit is summarized in movant's March 17 Memorandum of Law at pp. 2-5. Where, as here, payment of fees has been substantially deferred, counsel is authorized to apply current lodestar rates to past services in lieu of interest. *Le Blanc-Sternberg v. Fletcher*, 143. F.3d 748, 764 (2nd Cir. 1998).

[13]Movant's litigation experience is described in the March 17 declaration at pp. 111-113. Movant's *curriculum vitae* is set forth as Exhibit E to the March 17 declaration.

> In calculating attorney's fee awards, district courts use the lodestar method – hours reasonably expended multiplied by a reasonable hourly rate. In order to calculate the reasonable hours expended, the prevailing party's fee application must be supported by contemporaneous time records, affidavits, and other materials….A reasonable hourly rate is a rate 'in line with…prevailing [rates] in the community for similar services by lawyers of reasonably comparable skill, expertise and reputation.' A district court may also use its knowledge of the relevant market when determining the reasonable hourly rate. (citations omitted).

Since the parties have agreed on the "hours reasonably expended" by subjecting movant's application to a 19% reduction in hours claimed,[14] the only remaining step in calculating the lodestar is to determine movant's hourly rate. Under prevailing Second Circuit law, the District Court is instructed to look to the prevailing rates charged in the New York City legal market for similar services by lawyers of reasonably comparable skill, expertise and reputation. Under the established law of this Circuit, prevailing billing rates are established by the sworn declarations of knowledgeable lawyers who function in the relevant market, supplemented by the Court's independent knowledge of prevailing market rates. *Farbotko v. Clinton County,* 433 F.3d 204, 208 (2nd Cir. 2005).

In support of his application, movant has submitted sworn declarations from four distinguished lawyers attesting to the fact that litigators of movant's skill, expertise and reputation in the New York City legal market unquestionably bill least $700 per hour in connection with the delivery of the complex legal services required in this case.[15]

One declaration was submitted by Frederick A.O. Schwarz, Jr., a senior litigator with Cravath, Swain & Moore for many years, who served with distinction as Corporation Counsel of the City of New York, and as Chief Counsel to the Senate Select Intelligence Committee. Mr. Schwarz, speaking from personal knowledge, attested to movant's skill, expertise and reputation, and to the fact that a lawyer of movant's experience and standing would clearly command $700 per hour in the New York legal market.

A second declaration was submitted by James E. Johnson, an experienced litigator at Debevoise & Plimpton LLP, who served with distinction as Under Secretary of the Treasury for Enforcement. Mr. Johnson, speaking from personal experience, attested to movant's skill, expertise and standing, and to the fact that a lawyer of movant's experience and standing would "unquestionably" and "routinely" bill $700 per hour in complex matters in the New York City market.

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[14] The parties have resolved their disagreements concerning movant's time records by agreeing to reduce his application by 1,500 hours, or approximately 19%. Movant agreed to the reduction to avoid the enormous waste of time – both movant's and the court's – that a full evidentiary hearing on the objectors' factual challenges would have entailed. While movant continues to view the 1,500 hour deduction as a reasonable alternative to protracted evidentiary hearings, movant continues to believe that his time records are both accurate and justified.

[15]The declarations are annexed to movant's March 17 declaration as Exhibit H.

A third declaration was submitted by E. Joshua Rosencranz, a litigator at Heller, Ehrman, LLP. Mr. Rosencranz explained that Heller, Ehrman is relatively new to the New York legal market, and, therefore has taken particular care in establishing its billing structure. Mr. Rosencranz noted that of the 14 litigation partners at Heller, Ehrman, 5 bill at $750 per hour, even though three of the five, while seasoned litigators, are junior to movant. Mr. Rosencranz reports that the average billing rate for litigation partners at the firm is $664 per hour, including many lawyers far junior to movant. Finally, Mr. Rosencranz states that he bills at $680 per hour, even though he graduated from law school 22 years after movant, and is his junior in experience and standing. Mr. Rosencranz concludes that movant would be a "bargain" at $700 per hour.

The fourth declarant, Dean Nancy Rapoport, Dean of the University of Houston Law Center, is an academic lawyer specializing in bankruptcy with broad experience and knowledge of billing rates throughout the United States. Although Dean Rapoport does not personally know Mr. Neuborne, her experience comes in the context of court appointments of experienced lawyers, including academics with special litigation expertise, to help achieve the most efficient resolution of contested claims over the limited funds of bankruptcy. Dean Rapoport, who just recently returned to being a full-time professor, reports that lawyers of movant's expertise and standing routinely bill at $700 or more in the New York market.

Accordingly, under *Farbotko* and *McDonald*, the existing record, coupled with the Court's independent knowledge of the prevailing market, establishes as a matter of law that a litigator with comparable experience, expertise and reputation to that of movant would bill at least $700 per hour for the delivery of legal services in the New York legal market.

The alternative payment schedules offered by objectors are not only without legal foundation, they make no sense. That a lawyer of Mr. Neuborne's skill and reputation would accept the lower salary of an academic position to pursue his ability to teach and write says nothing about the value of his legal services. It is as if a lawyer who decided to take time off to train for a marathon would suddenly find his hourly rate reduced because he pursued another, less lucrative venture. The market does not work that way and the prevailing law follows the market. Nor are Mr. Dubbin's efforts to substitute an associate's compensation for that of an experienced senior lawyer, or to use a blended rate drawn from a statewide billing average, any more persuasive. Both suffer from the same flaw of seeking to substitute a fictive billing rate for the far more accurate rate actually established by sworn declarations that describe the prevailing market for lawyers of comparable skill, expertise and reputation.

Moreover, it bears emphasizing that there are no longer any live disputes as to billing records or what hours should be compensated, apart from the remaining contest as to the 800 hours challenged as "representing the court" and Mr. Dubbin's claim that there are only 600 hours of compensable service total. The stipulation entered before this Court included a general reduction of 1,500 hours (19%) to settle all claims of noncompensable activities. Accordingly, the sophisticated legal services described in the March 17 declaration at pp.1-78 clearly qualify for movant's lodestar billing rate, as that rate is determined by this Court.[16]

Finally, since the time of the last status conference, the Second Circuit ruled in *McDonald* that movant's market lodestar should be set in conformity with market rates for comparably skilled lawyers, and may not be reduced solely because of his low overhead as an academic solo practitioner. In *McDonald*, the Circuit cautioned that prevailing market lodestar may not be reduced solely because of low overhead of a solo practitioner or through the use of a hypothetical blended rate. [17] *McDonald* expressly instructs the District Courts that where, as here, the expertise, skill and reputation of an academic solo practitioner is reflected in an hourly rate set by the prevailing market, that market rate may not be diminished solely because of low overhead.

In *McDonald*, a solo practitioner submitted time records and sworn statements establishing a billing range for ERISA practitioners of comparable experience, skill and reputation. After discounting the hours claimed for lack of success and poor performance, the District Court in *McDonald* fixed an hourly lodestar that was considerably lower than the figure cited in counsel's supporting affidavits, noting that, as a solo practitioner, counsel had "lower overhead costs than attorneys associated with larger firms." *McDonald*, 450 F.3d 91, 2006 U.S. App. LEXIS 13965 *14-18 (June 6, 2006). The Circuit affirmed the 35% reduction in hours, and the lowering of the lodestar based on counsel's mediocre performance. *Id at LEXIS 13965* * 12. The Circuit categorically rejected, however, the notion that low overhead justifies a diminution in otherwise appropriate market-based fees. The Circuit held, in words that control this proceeding:

> …courts should not automatically reduce the reasonable hourly rate based solely on an attorney's status as a sole practitioner. *Overhead is not a valid reason for why certain attorneys should be awarded a higher or a lower rate.* Rather, overhead merely helps to account for why some attorneys charge more for their services. Indeed, it may be that in certain niche practice areas, attorneys of the highest "skill, expertise, and reputation" have decided to maintain a solo practice instead of affiliating themselves with a firm. The reasons for doing so may be numerous, including the inherent problems of higher overhead, fee sharing, and imputed conflicts of interest. *The focus of the inquiry into the reasonable hourly rate must instead be determined by reference to "prevailing [rates] in the community for similar services by lawyers of reasonably*

[16] The complex legal services provided by movant are described in the March 17 Memorandum of Law at pp. 10-15, and in greater detail in the March 17 declaration at pp. 1-78. The 29 formal legal proceeding in which movant represented the settlement classes are described in the March 17 declaration at pp. 40-70.

[17]Use of a so-called "blended rate" reached by averaging different lodestar market values for the different legal activities performed by movant and a hypothetical associate is not permitted in the Second Circuit. See *McDonald v. Pension Plan*, 450 F.3d 91, 2006 U.S. App. LEXIS 13965 *14-18 (June 6, 2006).

> *comparable skill, expertise, and reputation.” Id* at LEXIS13965 *13, n.6. (citations omitted)(emphasis added).

In this proceeding, movant, a lawyer of the highest “skill, expertise and reputation,” occupies a unique practice niche as a highly successful academic lawyer whose “skill, expertise and reputation” led Chief Judge Korman to urge movant to serve as Lead Settlement Counsel. Under *McDonald*, in setting the lodestar fee for such services, the task of the District Court is to determine the prevailing rates in the community charged by lawyers of comparable standing. Overhead has absolutely nothing to do with it. Thus, while a deduction from lodestar was approved in *McDonald* based on the mediocre quality of the services actually rendered, in this case Chief Judge Korman has acknowledged that movant has provided legal services to the settlement classes at the highest rank of the profession. Accordingly, movant is entitled as a matter of law to the $700 hourly lodestar established on this record. See *In re Continental Securities Litg.*, 962 F.2d 566, 568 (7th Cir. 1992) (“it is not the function of judges in fee litigation to determine the equivalent of the medieval just price. It is to determine what the lawyer would receive if he were selling his services on the market rather than being paid by court order”) (Posner, J.). [18]

[18] Prior to the Second Circuit’s decision in *McDonald*, Chief Judge Korman had indicated that he believed that an “academic discount” from movant’s market lodestar was appropriate to reflect an academic’s extremely low overhead. Judge Weinstein imposed a 17% discount on academics in the Agent Orange litigation. *In re “Agent Orange” Prod. Liab Litig.*, 611 F.Supp. 1296 (EDNY 1985). *McDonald* terminates the inquiry into substituted rates based on specific overhead.

In accordance with Chief Judge Korman’s pre-*McDonald* suggestion, movant assembled data on overhead in two settings. Citibank provided a letter based on its knowledge of overhead derived from its role as banker to many of New York City’s principal law firms. The Citibank letter indicates that the most efficient firms operate with a 17% overhead similar to the figure used by Judge Weinstein in *Agent Orange*. Since movant is not a partner in a large firm (and does not benefit from leverage), but rather, in the terms used in *McDonald*, is a respected solo practitioner with a niche practice, overhead figures for solo practitioners appear more relevant. Overhead for solo practitioners, derived from figures published by the Brooklyn Economic Development Corporation, involve a shared secretary, insurance, Internet access, and shared physical space. Movant’s investigation reveals that total overhead for a frugal solo practitioner does not exceed $50,000 annually. However, since *McDonald* precludes the use of such data, movant does not believe that more detailed analysis is necessary, and will not burden the Court with the overhead material unless requested to do so.

3. Movant is Entitled to an Excellence Multiplier.

The law of this case recognizes the appropriateness of an excellence multiplier designed to assure the accurate valuation of counsel's services. In fact, in 2002, Mr. Swift was awarded an excellence multiplier of 1.32 in connection with his fee application in order to reflect the fact that his lodestar failed to reflect an accurate valuation of his services to the class. *In re Holocaust Victim Assets Litig.*, 270 F. Supp.2d 313, 323-25 (EDNY 2002). Application of the same standard to movant's current application mandates an award both for excellence and for augmenting the settlement fund by more than $50 million.[19]

There is no question concerning the caliber of the legal services provided by movant to the plaintiff-classes. As Chief Judge Korman has acknowledged: "this was service, you know, of an extraordinary nature…that was rendered, and ought to be paid…. I think there are very few people in his league and I think I've gotten the best"). Tr, .Mar. 2, at pp. 13; 31. Moreover, movant's services to the class, detailed in the March 17 declaration at pp. 22-24; 116-119; 120-123, not only resulted in the successful implementation of the settlement, leading to the distribution of more than $900 million, to date, to more than 400,000 persons, the services actually resulted in a net increase in the settlement fund of between $50-$100 million. Movant succeeded in recovering $5 million from the defendants banks in the form of compound interest on funds held in the escrow fund. *In re Holocaust Victim Assets Litig.*, 256 F. Supp.2d 313 (EDNY 2002). Movant succeeded in persuading the banks to settle a dispute over funding the CRT by accelerating the payment of the final $334 million installment of the settlement, thereby making available at least $22.5 million in additional interest to the settlement fund. Finally, Mr. Neuborne, working closely with Mel Weiss, persuaded Congress to enact a private bill exempting the settlement fund from federal income taxation on earnings and distributions, a unique tax benefit conservatively estimated as adding $70 million to the settlement fund.

By any measure movant's representation has been extraordinarily successful. An appropriate excellence multiplier is, therefore, clearly warranted.

[19] As Chief Judge Korman noted, the excellence multiplier brought Mr. Swift's hourly award to $600 per hour in 2002, a sum fully consistent with movant's request for $700 in 2006.

4. Movant Should be Compensated For All Services that were Necessary for the Implementation of the Settlement, Regardless whether those Services Resulted in a Net Increase in the Settlement Fund.

As *McDonald* reiterates, a lawyer is entitled to lodestar compensation for all hours "reasonably expended" in delivering necessary legal services to a client. Despite such a firmly established rule, Mr. Dubbin argues that movant's entitlement to fees is limited to the 600 hours expended in increasing the net value of the settlement fund by between $50-$100 million. The remaining 6,200 hours, argues Mr. Dubbin, do not qualify for compensation.

This argument has no foundation in the present case. Movant was appointed as counsel to administer a complex settlement and to protect the corpus of the settlement fund from challenge. The fact that the corpus was expanded under movant's stewardship was an unexpected gain for the class, but was not the purpose of the appointment. Under Mr. Dubbin's theory, therefore, had movant delivered exactly the services the Court desired at the time of his appointment, his compensation would be zero, a clearly senseless result.

Perhaps Mr. Dubbin's argument results from confusing the standard for awarding common fund fees to counsel for an objector - requiring a showing of tangible benefit to the class – and the standard for compensating court-designated counsel. *See In re Holocaust Victim Assets Litig.*, 424 F.3d 150 (2nd Cir. 2005). In order for an objector to claim an equitable entitlement to compensation from the settlement fund, since no authorized person asked for the services, there must be some proof that the unrequested legal services actually produced tangible benefits for the settlement class. *In re Holocaust Victim Assets Litig.*, 424 F.3d 150 (2nd Cir. 2005) (denying fees to Mr. Dubbin). Otherwise, lawyers for objectors would be in a position to force the class to compensate them involuntarily, even though the class derived no tangible benefit from their legal services.

Where, however, the supervising District Judge appoints a Lead Settlement Counsel under Rule 23(d) and (g), and instructs him to provide the class with necessary legal representation in order to carry out the settlement agreement, the standard is not whether the size of the settlement fund is increased, but whether the legal services are reasonably necessary to the implementation of the settlement. Since the settlement classes obviously benefit from the delivery of necessary legal services by a court-designated Lead Settlement Counsel that defend the settlement against attack, and make possible the distribution of funds to class members, the common fund standard is clearly satisfied, even when the size of the fund is not increased. The "tangible benefit" to the class consists of receiving the authorized legal services needed to permit the payment of $900 million, thus far, to 400,000 members of the class. Mr. Dubbin's argument to the contrary is simply frivolous.

5. Movant is Entitled to Compensation for All Services Reasonably Necessary to Implement the Settlement, Including the Defense of District Court Rulings on Appeal.

The final remaining disputed issue concerns movant's work in defending the Court's rulings in connection with repeated appellate challenges. The issue here is not whether the hours were necessary or properly documented – all such matters are already resolved by the stipulated reduction in the overall hours claimed. Rather the issue is the contention by Mr. Swift that movant is precluded from receiving compensation from the settlement fund for 800 hours expended in defending the rulings of the District Court concerning the allocation of settlement funds.

At bottom, the claim is that since some class members objected to the allocation rulings of the Court, class counsel cannot be said to have been representing the class in defending such contested allocation decisions. Such an objection misunderstands the role of class counsel in a complex class action. In any complex class action, as the implementation of a settlement agreement unfolds over time, both Lead Settlement Counsel and the Rule 23 supervising District Judge will inevitably be called upon to make controversial decisions about allocation that will disappoint one or more members of a class. Such contested allocation decisions are occasionally challenged by objectors, who often question both the substantive correctness of the allocation decision, and the propriety of Class Counsel's actions in defending a Court's allocation decision favoring one segment of the class. The good faith activities of a Class Counsel in defending such judicial allocation rulings are, however, universally recognized as legitimate and compensable because they are necessary to the implementation of the settlement, even when objected to by individual class members. See *In re "Agent Orange" Prod. Liab. Litig.*, 800 F.2d 14, 18-19 (2d Cir. 1986); *Lazy Boy v. Witco Corp.*, 166 F.3d 581, 588-90 (3d Cir. 1999).[20]

Indeed, the result could not be otherwise. If an objector were able to mount a challenge to a Court-approved allocation decision, and then block the payment of reasonable fees to Class Counsel for defending the decision, it would become impossible to implement a complex class action. Objectors would be in a position to paralyze implementation, and to force the Court to pay tribute to them in order to permit the settlement to go forward. In fact, where, as here, a Class Counsel defends the allocation rulings of the District Court because they fall within the lawful discretion of the District Court, and because defense of the Court's rulings advances the best interests of the class as a whole, Lead Settlement Counsel performs classic legal services for the settlement classes that unquestionably qualify for compensation.

[20]*Agent Orange* and *Lazy Oil* involved unsuccessful efforts to disqualify Class Counsel from arguing in favor of contested allocations on grounds of conflict of interest. Mr. Swift seeks to deny Lead Settlement Counsel fees because he was, allegedly, being loyal to Chief Judge Korman, not to the class. However, the underlying complaint is the same – a challenge to Class Counsel's decision to defend an allocation that disappoints some class members. If anything, Chief Judge Korman's prior approval of the allocation makes this an easier case than *Agent Orange* or *Lazy Oil*, where Class Counsel initially made the contested allocation decisions without judicial guidance.

In this complex and unique class action, moreover, the case for compensation is even more compelling because the settlement-classes have adopted a pre-commitment strategy that obligates class members – and Lead Settlement Counsel – to respect the lawful outcomes of a fair allocation process, as an alternative to a socially destructive and economically wasteful adversary "war of all against all" in pursuit of a greater share of the settlement fund.[21]

The settlement agreement, as executed on January 29, 1999, made absolutely no provision for allocating the $1.25 billion settlement fund between and among five settlement classes, membership in four of which was confined to members of five victim groups, with settlement class members residing in five major geographical areas. The five settlement classes are: Deposited Assets (bank accounts); Slave Labor I (German companies); Slave Labor II (Swiss companies); Looted Assets (Swiss fences); and Refugees (Swiss government). Membership in four of the settlement classes (excluding Slave Labor II) is confined to members of five victim groups: Jews, Jehovah's Witnesses, Sinti-Roma; homosexuals, and the disabled. Members of the five settlement classes reside in the United States, the former Soviet Union, Western Europe, Eastern Europe and the rest of the world. A moment's reflection reveals that the constellation of classes, victim groups and geographical areas with substantial, potentially conflicting claims on the settlement fund generates as many as 125 separate interest groups (5 x 5 x 5=125).

It would, of course, have been impracticable to appoint separate counsel for each interest group, and to rely upon a classic adversary process to allocate the settlement funds. Such an approach would have been economically wasteful, requiring the compensation of multiple lawyers; socially disastrous, pitting survivors against each other at the ends of their lives in an unseemly squabble for a pittance; and administratively unworkable, leading to a modern version of *Jarndyce v. Jarndyce*. Indeed, in the absence of an alternative to a classic adversary model, the settlement may well have failed under *Amchem Products v. Windsor*, 521 U.S 591 (1997) and *Ortiz v. Fibreboard Corp.*, 472 U.S. 815 (1999).

Instead, Lead Settlement Counsel, after accepting the District Court's designation as Lead Settlement Counsel, implemented a novel "pre-commitment strategy," that asked the members of the settlement classes to pre-commit to respect the lawful results of a fair allocation process that assured class members "exit, loyalty and voice." [22] Those members of the settlement classes who did not wish to pre-commit to respect the outcome of the fair allocation process were given the opportunity to opt out in order to pursue their individual claims. The class overwhelmingly endorsed the pre-commitment strategy, returning 564,000 questionnaires indicating a desire to participate in the allocation process.

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[21] The pre-commitment strategy adopted by the settlement classes is described in the March 17 declaration at pp. 100-04.

[22] As movant has noted, it was crucial to the pre-commitment strategy that Lead Settlement Counsel was able to represent to the Court that he was free from any economic conflict of interest in supporting such a strategy because he had no economic stake in the acceptance of the settlement. See *supra* at pp.6-10.

The fair allocation process that was overwhelmingly embraced by the class consists of a neutral Special Master, with the duty to confer broadly with all class members wishing to be heard before suggesting a proposed plan of allocation and distribution, which is then the subject of a plenary hearing before the District Court. If, after the hearing, the District Court deems the plan acceptable, the plan is then subject to appellate judicial challenge and, if upheld, implemented. Under the pre-commitment strategy, Lead Settlement Counsel's role in the allocation process was to assure that the concerns of all class members were heard by the Special Master; to assure that all allocation decisions complied with law; and to defend the allocation judgments against challenge as long as they were lawful and in the best interests of the class as a whole. It is obvious that the pre-commitment strategy could not work unless Lead Settlement Counsel were prepared to defend the outcome of the process against challenge. That is exactly what movant has done.

Accordingly, there is no dichotomy between movant's activities in defending the best interests of the class, and his activities in defending the lawful allocation judgments that emerged from the fair process to which the class had pre-committed itself. In fact, it would have been impossible to implement the settlement in the absence of such a pre-commitment strategy. Either the settlement would have failed under *Amchem*, or its implementation would have become entangled in an economically wasteful, socially disastrous, and administratively unworkable procedural swamp.

Mr. Swift argues that because, in several settings, movant disagreed with the District Court's rulings, but, nevertheless, defended them, movant could not have been acting on behalf of the settlement classes. However, such an argument misconceives Lead Settlement Counsel's role under the pre-commitment strategy. During the allocation process, movant routinely offered an opinion to the Special Master and the District Court on allocation issues. Given the broad discretion that rests with a Special Master and supervising District Court in making allocation judgments, however, in the vast bulk of the settings, Lead Settlement Counsel offered advice on allocation issues, but recognized that the final judgment rested with the fair allocation process that the class had adopted. On many occasions, movant's advice was accepted. On no occasion was it ignored. On several occasions, it was rejected. In those settings, since movant had urged class members to pre-commit to the outcome of a fair allocation process, and since the judgments fell within the broad discretion of the District Court, Lead Settlement Counsel defended the judgments because they were lawful and because it was clearly in the best interests of the class to preserve and defend the fair allocation process on which the future stability of the settlement's implementation depended.[23]

[23] Movant's decision to defend the District Court's lawful allocation rulings was made easier by the fact that adversary opposition to the rulings was provided by objectors represented by Mr. Dubbin and Mr. Swift, assuring that all sides of the issue would be heard by the reviewing Courts.

Finally, Mr. Swift argues that Chief Judge Korman's order, dated September 13, 2004, appointing Lead Settlement Counsel to provide adversary defense of his rulings in the Second Circuit precludes payment of fees from the settlement fund. *In re Holocaust Victim Assets Litig.,* 415 F. Supp.2d 130 (EDNY 2004). However, Mr. Swift's argument both mis-states the purpose of Chief Judge Korman's order, and ignores movant's response.

As the order recites, its purpose was to remove any confusion in the Second Circuit's clerk's office concerning Lead Settlement Counsel's standing in the pending appeal. A member of the clerk's office had questioned whether movant was entitled to file papers on appeal. Of course, the clerk was wrong, and the order was unnecessary, since the District Court's April 11, 1999 order appointing movant as Lead Settlement Counsel provided the needed authorization to appear on behalf of the settlement classes. Chief Judge Koman's September 13, 2004 order was merely a "belt and suspenders" effort to avoid administrative delay in processing the appeal.

More importantly, Mr. Swift ignores movant's reaction to Chief Judge Korman's order. On September 14, 2004, upon becoming aware of the order, movant wrote Chief Judge Korman unequivocally rejecting any status as a functionary of the District Court. As movant stated:

> …when I accepted your request that I agree to serve as Lead Settlement Counsel, I entered into an intense attorney-client relationship with the class that continues to this day. Thus, when I appear in defense of your rulings, I do not appear solely as a functionary of the Court, but as Lead Settlement Counsel for the plaintiff-classes with a duty to defend your rulings as long as they are supported by law, or rest within your discretion.
>
> * * *
>
> In the almost five years that I have functioned as Lead Settlement Counsel, I have viewed my role as implementing the class's overwhelming decision to opt for …a fair allocation process. As you note, I have sought to facilitate open communication between any member of the class and the Special Master, as well as the Court. I have advised class members on the best way to present their concerns to the Court. I have provided the Court with personal views on allocation and distribution decisions. But, most of all, I have committed myself to defend the results of the process, even when I do not wholly agree with the outcomes.
>
> * * *
>
> Thus, as applied to the pending Second Circuit appeals, we come out in the same place. You appear to

> view my duty as flowing from your appointment of me as your lawyer. I view my duty as flowing from my duty as Lead Settlement Counsel to defend the outcomes of the fair decisional processes that make the administration of the settlement possible.
>
> If I believed that your rulings were not in accordance with law, or were an abuse of your very broad discretion, I would not defend them. Indeed, if I believed you were acting unlawfully, as Lead Settlement Counsel, I would oppose your orders…."

Letter from Burt Neuborne to Chief Judge Korman, September 14, 2004.

Accordingly, movant's successful defense of the District Court's lawful allocation orders, carried out after an independent and good faith determination that the allocation orders were lawful, and that their defense advanced the best interests of the class in the orderly implementation of the settlement, clearly qualifies for compensation from the settlement fund.

Conclusion

In accordance with Chief Judge Korman's remand, and pursuant to the parties' agreement concerning the resolution of factual issues arising out of movant's records, the Magistrate Judge should report and recommend to Judge Block that movant is entitled to compensation for 6,878.5 hours of service as Lead Settlement Counsel at his prevailing market lodestar of $700 per hour, resulting in a lodestar award of $4,814,950, plus an appropriate multiplier of 1.32 (equal to that awarded earlier to Mr. Swift) reflecting the delivery of excellent legal services that augmented the net value of the settlement fund by between $50-$100 million.

Although the legal fee sought by Lead Settlement Counsel for seven years of dedicated service is substantial, the fee must be viewed in the context of the overall expenses of administering this enormously complex settlement, which will approximate $100 million, exclusive of notice costs; and in the context of the amounts billed by Special Masters on an hourly basis, which exceed $13 million. Legal fees totaling 5% of administrative costs are extremely modest, as are legal fees that are less than 1/3 of the hourly fees already paid to the Special Masters herein. It should be noted, moreover, that all administrative costs, including legal fees and Special Master fees, are being paid from interest earned on the settlement fund, which, thus far, approximates $200 million. In fact, class members are receiving more than 100% of the $1.25 billion settlement.

Dated: July 21, 2006
New York, New York

Respectfully submitted,

/s/

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